



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 373 OF 2008

KIRINJIT SINGH MAGONPLAINTIFF

VERSUS

BONANZA RICE MILLERS LTD.....DEFENDANT

J U D G E M E N T

1. The Plaintiff's claim against his former employer, the Defendant, is for damages in negligence. He has pleaded that on 31st August 2006 he was injured by robbers while in the course of his employment at the Defendant's premises. It is his claim that the attack took place on account of the Defendant's negligence in failing to provide him with security, given the nature of his duties, and failure to secure the work premises. Particulars of negligence were pleaded.
2. Particulars of injuries are also pleaded. They included various fractures as a result of gun-shots.
3. The Defendant, in its statement of defence, admitted that the Plaintiff was attacked as pleaded. But it denied the negligence attributed to it and pleaded that the Plaintiff had express instructions to hire armed security for himself (at the Defendant's expense) at all times when he performed cash-transit duties, but that he failed to do so and thereby exposed himself to risk; and that he designed a predictable money-withdrawal pattern known to all people, also thereby exposing himself to risk. Particulars of the said negligence are pleaded.
4. The Defendant also pleaded that it had provided adequate security for the Plaintiff, and that the attack upon him by thugs could not reasonably be foreseen and prevented.
5. Finally the Defendant pleaded that it was not liable to the Plaintiff in negligence as sought, and that it had discharged its obligations to him by having in place an appropriate insurance cover and by defraying his medical bills.
6. The case was heard by Khaminwa, J on 19th September 2012. The Plaintiff testified and called no other witness. One witness testified for the Defendant. Written submissions were then filed on behalf of the parties. Due to unavoidable circumstances Khaminwa, J could not prepare judgment. That is how the file has ended up with me.
7. Just before hearing commenced special damages were agreed at KShs 1,211,182/00 subject to proof of liability.

8. I have considered the testimonies of the Plaintiff and the Defendant's witness, RAJNIKANT VELJI MEGHJI SHAH as recorded by Khaminwa, J and as set out in their respective witness statements. I have also considered the documents relied upon by the Plaintiff comprised in his list and bundle of documents dated 28th and filed on 29th September 2010. Finally I have considered the written submissions of the parties, including the cases cited.

9. There is an **agreed statement of issues dated and filed on 27th May 2010** that contains some twenty-two (22) issues for determination, many of them repetitions. After reading the pleadings, the testimonies of the witnesses, the documents admitted in evidence and the written submissions, it is apparent that the following facts are not in dispute –

1. That the Plaintiff was an employee of the Defendant at the material time.
2. That his duties included going to the bank for purposes of banking and cash withdrawals as the case might be.
3. That the Plaintiff was attacked by robbers upon just re-entering the Defendant's premises after returning from the bank to withdraw money for the Defendant's employees' salaries for the month. He was thus attacked in the course of performing his duties.
4. That the Plaintiff received fractures and other injuries inflicted by the robbers by gun-shot.
5. That the Defendant paid for the initial treatment of the Plaintiff and also paid him compensation under the *Workmen's Compensation Act*.

10. The main outstanding issues to be decided are therefore, in my mind, the following –

1. **Whether the Defendant was under a duty to accord to the Plaintiff particular security while he was performing the duties of banking and withdrawing cash.**
2. **If so, whether the Defendant provided such security?**
3. **Whether the Plaintiff had the authority of the Defendant to hire, at the Defendant's cost, such necessary security while he was performing the duties of banking and withdrawing cash, and if so, whether the Plaintiff failed to do so?**
4. **Whether the Plaintiff was by his conduct or otherwise guilty of contributory negligence?**
5. **Whether the Defendant is liable to the Plaintiff in damages?**
6. **What injuries did the Plaintiff suffer?**
7. **What damages, if any, are due to the Plaintiff?**

11. It will be convenient to consider Issues Nos. 1, 2, 3 and 4 together. It is stated at **paragraph 562** of the 4th Edition, Vol 16 of *Halsbury's Laws of England* at follows:

“It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care, an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee, to compensate him from an injury which he may sustain in the course of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition, nor is he an insurer of his employee's safety; the exercise of due care and skill suffices. The employer does not owe any general duty to the employee to take reasonable care of the employee's goods: the

duty extends to his person.”

12. In the case of **Smith v Baker & Sons [1891] AC, 325** Lord Herchell stated as follows –

“It is clear that the contract between employer and employed involves, on the part of the former, a duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition and so to carry on his obligations as not to subject those employed by him to unnecessary risk.”

And at **paragraph 560** of the same **Vol 16** of *Halsbury’ Laws of England* it is stated, *inter alia* -

“At common law an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances...so as not to expose them to an unnecessary risk.”

13. Applying the above stated principles, our *Court of Appeal* in the case of **Mumende v Nyali Golf & Country Club [1991] KLR** held as follows –

“1. It is an implied term of employment that an employer will make the conditions of employment to his employee absolutely safe and will not expose his employees to any danger...but will not be responsible for the employee’s own negligence in execution of such employment.

2. The employer was aware of the danger that the employee was subjected to and it failed to do what was required of it and for that reason it was negligent.

3. Just because an employee accepts to do a job which happens to be inherently dangerous is no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measures of protection.

4. In measuring the degree of care one must balance the risk against the measures necessary to eliminate the risk.”

14. It is common ground that part of the Plaintiff’s work was to bank and withdraw money on behalf of the Defendant. There is no indication as to what kinds of the deposits he made, large or small; but the withdrawals included monthly salaries for the Defendant’s staff. The Plaintiff in all probability banked and withdrew large sums of money.

15. Banking and withdrawal of large sums of money in this country, and probably in other countries as well, is dangerous work. Bank robberies in this country in the late 1960s and early 1970s led to the change of the law to provide for the death penalty for robbery with violence. Robbery involving money in transit and robbery of people either going to the bank or coming from the bank after withdrawal is common-place.

16. In these circumstances what reasonable measures and care for the safety of its employee involved in banking and withdrawals of large sums of money would an employer provide so that such employee is not exposed to unnecessary risk?

17. The evidence before the court is that no special transport was provided to the Plaintiff such that he used his own car. He had no special guard assigned to him and had only the company driver for a companion. The Defendant has pleaded that it had authorized the Plaintiff to hire special security for the occasions when he was banking or withdrawing money from the bank, but it produced no evidence of this authority.

18. In my judgment, the least that the Defendant should have done was to provide an armed guard, that

is, armed with a firearm, and special transport, though not necessarily an armored vehicle. The evidence now before the court suggests that the Defendant left the Plaintiff to his own devices to do the best that he could for his protection when he was involved in the dangerous duty of banking and withdrawing money. The Defendant failed in its duty to make sure that the Plaintiff was safe when he performed those duties and thereby exposed him to danger. **On liability therefore I find for the Plaintiff.**

19. Is the Defendant liable to the Plaintiff in damages? It certainly is as the Plaintiff received serious injuries in the robbery.

20. The available medical evidence indicates that the Plaintiff received two gun-shots. One bullet penetrated his right flank and lodged in the body. In hospital it was explored and removed. Another bullet penetrated the left leg in the region of the knee. It shattered the lower end of the left femur and destroyed the knee ligaments. At hospital in Nairobi he was operated on and internal fixation of the fractures with an angle plate carried out. But there were many broken fragments of bone which could not be secured. Another operation was therefore done to reduce the fractures and fix them better. Because the femur had been badly fractured and fragmented, extensive reconstruction using wires was done. After the surgeries a *plaster of paris* cast was applied to immobilize the leg. On review after two months it was found that the left knee was still very unstable and he was advised to undergo total knee replacement surgery. This was subsequently done in India. **His permanent functional disability was assessed at 35% of the total person.**

21. The Plaintiff's treatment and management of his injuries no doubt involved a lot of pain. He had to undergo several surgeries both locally and in India.

22. In assessing damages for pain, suffering and loss of amenities I have considered the medical reports before the court. The Plaintiff was aged about 60 years at the time of the injury. I have considered his undeniable painful and distressing course of treatment and the residual effect of the injuries upon him. Finally I have considered that that with the destruction of his left knee the functionality of his left leg is all but gone. This is what has led to the total disability in the order of 35% of the total person.

23. Doing the best that I can, and balancing this against that, and after considering the submissions filed on behalf of the parties, including the comparable cases cited, **I will award the Plaintiff KShs 2 million for pain, suffering and loss of amenities.** As already noted there is a consent in respect to special damages of KShs 1,211,181/00.

24. I will in the event enter judgment for the Plaintiff against the Defendant as follows –

(i) **General damages - KShs 2,000,000/00**

(ii) **Special damages - KShs 1, 211, 182/00**

25. There will be interest at court rates on both sums. For general damages it will run from the date of judgment and for the special damages from the date of filing suit. The Plaintiff shall have costs of the suit. There will be judgment accordingly.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 7TH DAY OF FEBRUARY 2014

H. P. G. WAWERU

JUDGE